Appendix A

APPENDIX A - OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED SEPTEMBER 11, 1997

NOT FOR PUBLICATION

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED
SEP 11 1997
Cathy A. Catterson, Clerk
U.S. Court of Appeals

DAVID K. BLEASDELL,
Plaintiff-Appellant,
v.
NATIONAL MEDICAL ENTERPRISES, INC.,
Defendant-Appellee.

No. 95-56470
D.C. No. CV 94-01989-LGB

Appendix A

MEMORANDUM*

Appeal for the United States District Court
for the Central District of California
Lourdes G. Baird, District Judge, Presiding

Argued and Submitted March 5, 1997
Pasadena, California

Before: SCHROEDER, FERGUSON, and LEAVY, Circuit Judges

David K. Bleasdell appeals the district court's grant of summary judgment for National Medical Enterprises, Inc. Bleasdell alleges that National Medical violated the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621, et seq., and breached its implied-in-fact employment contract with Bleasdell. Because the district court erred in evaluating National Medical's motion for summary judgment with respect to age discrimination, we reverse. We affirm on the employment contract claim.

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* This disposition is no appropriate for publication and may not be cited to or by the courts of this Circuit except as provided by 9th Cir. R. 36-3.

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I. THE EMPLOYMENT DISCRIMINATION CLAIM

Bleasdell was hired as a pilot and mechanic for National Medical in 1980. Six years later, he was promoted to the position of pilot-in-command/captain pilot. After eleven years with National Medical, Bleasdell was terminated involuntarily. At the time of his termination, he was 52 years old -- the oldest pilot in the Department.

National Medical claims that Bleasdell was terminated for dishonesty and inadequate piloting skills. Walter Kraujalis, Manager of the Aviation Department at the time Bleasdell was terminated, submitted declarations in support of National Medical's motion for summary judgment.

Specifically, Kraujalis referred to two incidents, which relate to Bleasdell's piloting skills and his report of those events. The first occurred in July of 1990, when Bleasdell was pilot-in-command on a flight which landed in Gainsville, Georgia. Bleasdell's co-pilot, Andy Higgins, was the actual pilot. On its final approach, Bleasdell noticed that the aircraft was experiencing a high sink rate which requires an increase in power to avoid a hard landing. He explained this to Higgins. However, Higgins failed to respond and temporarily lost control of the plane. Bleasdell took control and landed it safely. The plane bounced on the runway several times.

The second incident occurred in April of 1991. Bleasdell was captain on a flight to Lexington, Kentucky. Bleasdell was piloting a newly acquired aircraft, the Gulfstream III. Walter Kraujalis served as his co-pilot and instructor. The plane bounced upon landing and Bleasdell piloted the plane back into the air and executed another approach and landing.

Bleasdell contended that these incidents were not truly the basis for his termination but were mere pretexts. He submitted a declaration from Robert Metz, his supervisor at National Medical during the time these incidents occurred, as support. Metz recalled these incidents and questioned whether they were significant enough to warrant Bleasdell's dismissal.

In particular, Metz questioned how Kraujalis' evaluation of the events which transpired during the Gainsville flight could have been accurate, especially given that the event occurred several years before Kraujalis was employed by National Medical and was based only on a review of written accounts by Metz and Bleasdell. Metz declared that Kraujalis' evaluation was without a plausible basis for inferring that Bleasdell's actions were below standard. Metz also considered the Lexington landing. He stated that after fully evaluating the situation, including interviewing both Bleasdell and Kraujalis, he concluded that Bleasdell's actions may have been prudent under the circumstances.

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II. STANDARD OF REVIEW

We review the district court's grant of summary judgment on the age discrimination claim de novo. Nidds v. Schindler Elevator Corp., 113 F.3d 912, 916 (9th Cir. 1997). In the context of defending against a summary judgment motion, a plaintiff alleging employment discrimination has the burden of "producing enough evidence to permit the trier of fact to infer the fact at issue." Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 254 n. 7 (1981).

III. MCDONNELL DOUGLAS' SHIFTING BURDENS OF PROOF

We apply the burden-shifting method established by the Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), to evaluate claims of age discrimination in employment by plaintiffs who do not have direct evidence of their employer's discriminatory intentions. See Rose v. Wells Fargo & Co., 902 F.2d 1417, 1420 (9th Cir. 1990).

The application of the McDonnell Douglas method to age discrimination cases requires a plaintiff to first establish a prima facie case. The elements of a prima facie case are that the plaintiff:

(1) was a member of the protected class (age 40 to 70);

(2) was performing his job in a satisfactory manner;
(3) was discharged; and
(4) was replaced by a younger employee.

Messick v. Horizon Indus., Inc., 62 F.3d 1227, 1229 (9th Cir. 1995). The burden of establishing a prima facie case is not designed to be "onerous." Burdine, 450 U.S. at 253. It only requires the production of evidence which suggests that the employment decision was based on age. Diaz v. American Tel. & Tel., 752 F.2d 1356, 1361 (9th Cir. 1985). Upon establishing a prima facie case, a presumption of unlawful discrimination arises. Burdine, 450 U.S. at 254.

After the plaintiff has established a prima facie case, the burden of production then shifts to the employer to articulate a legitimate, nondiscriminatory reason for the plaintiff's termination. See Wallis v. J.R. Simplot Co., 26 F.3d 885, 889 (9th Cir. 1994). Once the defendant has satisfied its burden, the presumption of unlawful discrimination vanishes. See St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 511 (1993).

At this point, in order to survive summary judgment, the plaintiff "must produce enough evidence to allow a reasonable fact finder to conclude either: (a) that the alleged reason for [his] discharge was false, or (b) that the true reason for his discharge was a discriminatory one." Nidds, 113 F.3d at 918. As explained in Nidds, to survive a summary judgment motion, a plaintiff need not provide direct evidence of discriminatory intent as long as a

reasonable fact finder could conclude -- based on the plaintiff's prima facie case and the fact finder's disbelief of the defendant's reasons for discharge -- that discrimination was the real reason for the discharge. Id. at 918 n. 2.

IV. APPLICATION

The district court held that Bleasdell failed to provide sufficient facts to establish a prima facie case of age discrimination. Specifically, the court held that Bleasdell failed to prove he was performing his job satisfactorily. We disagree.

Bleasdell introduced his two most recent performance evaluations and the declaration from Robert Metz, his former supervisor. These documents provide sufficient evidence that Bleasdell performed his job satisfactorily. See Messick, 62 F.3d at 1229 (stating the requisite degree of proof to establish satisfactory performance element of prima facie case is minimal).

The district court's alternative basis for granting summary judgment in favor of National Medical on Bleasdell's ADEA claim was also in error. The district court held that Bleasdell failed to satisfy his ultimate burden because he failed to show that National Medical's stated reasons for terminating him were false and that the real reason for his termination was discrimination.

The district court erred by adopting an overly stringent test for evaluating whether or not Bleasdell had

provided sufficient evidence to withstand summary judgment. This court has rejected the application of what has been dubbed "pretext plus" to the evaluation of motions for summary judgment. See e.g. Nidds, 113 F.3d at 918 n. 2. Rather, we have held that "[a]lthough the mere existence of a prima facie case, based on the minimum evidence necessary to raise a McDonnell Douglas presumption, does not preclude summary judgment, the plaintiff need produce very little evidence of discriminatory motive to raise a genuine issue of fact as to pretext." Warren, 58 F.3d at 442 (internal citations omitted); see also Washington v. Garrett, 10 F.3d 1421, 1433 (9th Cir. 1993).

Bleasdell presented sufficient evidence to create an inference that the reasons given by National Medical to justify its decision to terminate Bleasdell were pretextual. In particular, while the declaration from Metz acknowledges that the landing incidents cited occurred, it disputes that they were truly the basis for Bleasdell's termination.

A former supervisor who is personally aware of the facts cited by an employer to justify its decision to terminate a plaintiff can offer important insight into whether the reasons offered by the defendant were pretextual. Very rarely can a plaintiff find direct evidence of intent. This is especially true when defending against an employer's motion for summary judgment. Metz's declaration creates a triable issue of fact as to whether the stated reasons for Bleasdell's termination were false. That is a decision which must be left to a finder of fact.

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V. BREACH OF CONTRACT OF CLAIM

Bleasdell also claims that National Medical breached its employment contract by terminating him without cause. We reject this argument.

Under California law, employment with no specified term may be terminated at the will of either party at any time. See Cal. Lab. Code § 2922. This presumption of at-will employment may, however, be rebutted by evidence of an implied agreement limiting the employer's right to discharge the employee. See Foley v. Interactive Data Corp., 765 P.2d 373, 376 (Cal. 1988). National Medical claims that Bleasdell was an at-will employee, as evidenced by his having signed written acknowledgments to that effect on three separate occasions in 1983, 1988, and 1990.

National Medical claims that these acknowledgments were intended by the parties as final expressions of their agreement and therefore cannot be contradicted by parole evidence. Bleasdell concedes that he signed the at-will acknowledgments, but argues that they are not binding, integrated contracts because the acknowledgments are contained in an employee handbook which states that the handbook is not intended to create a contract for employment and that the handbook may be modified or amended by National Medical.

Bleasdell's arguments are without merit. An agreement may be integrated with respect to one or more, but less than all, of its provisions. Comeaux v. Brown &

Williamson Tobacco Co., 915 F.2d 1264, 1271 n. 7 (9th Cir. 1990). The 1990 acknowledgment signed by Bleasdell included an integration clause with respect to the length and termination of employment. We agree with the conclusion of the district court that the signed acknowledgments were intended to be a final expression of the parties' agreement on the term of employment. Bleasdell cannot introduce extrinsic evidence of an alleged implied contract to terminate only for cause. See id. Bleasdell has failed to present a genuine issue of material fact for breach of an implied contract to terminate only for cause.

VI. CONCLUSION

We reverse the grant of summary judgment on the ADEA claim and affirm on the employment contract claim. The ADEA claim is remanded for trial.

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Bleasdell v. National Med. Enters., Inc., No. 95-56470
LEAVY, Circuit Judge, dissenting, in part:

I dissent from that portion of the disposition which reverses the judgment on the ADEA claim.

I agree with the majority that Bleasdell established a prima facie case by providing sufficient evidence that he was performing his job satisfactorily. See Messick, 62 F.3d at 1229. I disagree with the majority's conclusion that the affidavit from Bleasdell's former supervisor, Metz, provides sufficient evidence to allow a trier of fact to infer that National Medical's reasons for termination were pretextual.

National Medical offered evidence that Bleasdell was terminated for dishonesty and inadequate piloting skills. During the Lexington landing incident, Bleasdell, the pilot-in-command, hit the ground hard, aborted the landing, and made a second attempt to land. National Medical's chief executive officer, Mr. Eamer, was a passenger on this flight. When Bleasdell aborted the landing, Eamer shouted to the cockpit, demanding to know what had happened. Bleasdell directed his flight mechanic to lie by telling Eamer that something blew across the runway.

Metz's affidavit does not create a triable issue with respect to any of these assertions of fact. See Anderson v. Baxter Healthcare Corp., 13 F.3d 1120, 1124-25 (7th Cir. 1994) (a supervisor's disagreement with the employer's termination decision creates a triable issue only when the supervisor specifically refutes the facts that allegedly

support the employer's claim of performance deficiencies). Metz does not say that the troublesome landings did not occur, nor does he say that Bleasdell did not lie to Eamer. Neither Metz nor anyone else say that these events were trivial. Instead, Metz simply gives his own assessment of these undisputed events to minimize their importance. Simply questioning management's judgment created no triable issue of fact. See Anderson, 13 F.3d at 1124-25.

Moreover, at the time of his affidavit, Metz was not Bleasdell's supervisor. The record shows that Metz was demoted as supervisor because the employer was dissatisfied with Metz's handling and supervision of Bleasdell regarding the landings at issue. A former supervisor's general opinions regarding past job performance are insufficient to contradict the employer's current business decision which weighs performance-based considerations. Williams v. Williams Elecs., Inc., 856 F.2d 920, 924 (7th Cir. 1988).

The ADEA is not a general regulation of the workplace, but a law which prohibits discrimination. The statute does not constrain employers from exercising significant other prerogatives and discretions in the course of discharging their employees. See McKennon v. Nashville Banner Pub. Co., 513 U.S. 352, 361 (1995). This court should not be concerned with whether National Medical's decision was wise, accurate, ill-informed, or ill-advised. The pretext inquiry focuses on the honesty, not the accuracy or wisdom, of the reasons for termination. See Helland v. South Bend Community Sch. Corp., 93 F.3d

327, 330 (7th Cir. 1996), cert. denied, 117 S. Ct. 769 (Jan. 21, 1997).

National Medical was assessing the performance of a pilot charged with the safe transportation of employees and clients. Bleasdell has failed to produce specific evidence which would create an inference of age discrimination. I would affirm the grant of summary judgment.

Appendix B

APPENDIX B - JUDGMENT AND ORDER OF THE UNITED STATES DISTRICT COURT, CENTRAL DISTRICT OF CALIFORNIA FILED AUGUST 29, 1995

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

FILED
AUG 29 1995
Clerk, U.S. District Court
Central District of California

DAVID K. BLEASDELL,
Plaintiff,

v.

NATIONAL MEDICAL ENTERPRISES,
Defendant.

CV 94-1989 LGB (SHx)

JUDGMENT

The Court hereby ORDERS, ADJUDGES, and DECREES that judgment be and hereby is entered in favor of defendant, NATIONAL MEDICAL ENTERPRISES, and against plaintiff DAVID K. BLEASDELL, on plaintiff's first amended complaint, and that plaintiff take nothing of defendant by way of that complaint.

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SO ORDERED.

Dated: August 28, 1995

/s/
LOURDES G. BAIRD
United States District Judge

Appendix B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

FILED
AUG 29 1995
Clerk, U.S. District Court
Central District of California

DAVID K. BLEASDELL,
Plaintiff,
v.
NATIONAL MEDICAL ENTERPRISES, INC.,
Defendant.

CV 94-1989 LGB (SHx)

MEMORANDUM AND ORDER GRANTING SUMMARY JUDGMENT

I. INTRODUCTION

Defendant National Medical Enterprises, Inc. has moved this Court for summary judgment on all claims asserted in plaintiff's first amended complaint. Having reviewed all pertinent papers on file herein, including the supplemental material submitted by plaintiff, and having considered the argument of counsel, the Court, for the reasons set forth below, ORDERS that defendant's motion for summary

judgment is hereby GRANTED and that judgment be ENTERED accordingly.

II. FACTUAL BACKGROUND

The following facts, and any others so indicated below, appear to be undisputed. Plaintiff David Bleasdell was employed by defendant National Medical Enterprises, Inc. (NME) as a pilot and mechanic in NME's aviation department. (Bleasdell Dep. at 54-75.) Plaintiff was hired in August 1980, and was not hired for any specified term. (Id.)

On October 14, 1983, Bleasdell signed an "Acknowledgment," which states in part that "[u]nless otherwise specified in a written contract of employment signed by a duly authorized official of the company, all employment has no specific term and is governed by section 2922 of the Labor Code. Continuation of employment is always at the company's sole discretion." (Id., Ex. 6.) On March 12, 1988, Bleasdell signed another "Acknowledgment," which states that

> [u]nless otherwise specified in a written contract of employment signed by a duly authorized official of the company, all employment has no specific term and is at the mutual consent of the employee and the company. Accordingly, either the employee or the company can terminate the employment relationship at will, with or without cause, at any time.

(Id., Ex. 7.) On April 11, 1990, plaintiff signed a further "Acknowledgment," which states that

> [u]nless otherwise specified in a written contract of employment signed by a duly authorized official of the company, all employment has no specific term and is at the mutual consent of the employee and the company. Accordingly, either the employee or the company can terminate the employment relationship at will, with or without cause, and with or without notice, at any time, and this decision shall constitute the entire agreement between the company and its employees with respect to the length of employment, and both the termination of employment and the manner in which employment may be terminated.

(Id., Ex. 8.)

At some point during the term of plaintiff's employment with NME, he became a "pilot-in-command," and was thus given the authority to determine whether flights could be safely completed or should be diverted for safety considerations. (Kraujalis Decl., Ex. A; Bleasdell Dep. at 161-65.) The position of pilot-in-command is both an important and sensitive one. (Id. at 161.) on July 5, 1990, plaintiff was pilot-in-command on a Falcon 10 aircraft that landed in Gainsville, Georgia. (Id. at 271-73; Ex. 16.) Plaintiff was accompanied by NME employee Andy Higgins, who was in the left seat of the aircraft and was responsible for flying the plane. (Id. at 273, Ex. 16.) In addition to acting as pilot-in-command, plaintiff was

responsible for co-piloting the aircraft, operating the radio, assisting with navigation, and overseeing Higgins's performance. (Id. at 273.) On the final approach, at approximately thirty feet above the runway, plaintiff noticed that the aircraft was experiencing a high sink rate (a "sinker" in the vernacular), which ordinarily necessitates an increase in power to avoid a hard landing. (Id. at 271-85; Ex. 16.) Plaintiff verbally called out to Higgins that the aircraft was experiencing a sinker. (Id. at 271-85; Ex. 16.) Higgins failed to properly respond and temporarily lost control of the aircraft, which resulted in a "hard landing" and the plane bouncing off of the runway from two to four times. (Id. at 271-85; Ex. 16.) Plaintiff grabbed the controls after approximately the second bounce. (Id. at 271-85; Ex. 16.) It is possible that plaintiff could have taken the controls from Higgins sooner than he did. (Metz Decl. ¶ 24.) Plaintiff reported this incident (the so-called Gainsville incident) to Robert Metz, Aviation Manager, primarily because the passengers on the aircraft were shaken by the landing. (Bleasdell Dep. at 271-85; Ex. 16.)

In April 1991, plaintiff was captain on a leg of a flight between Bangor, Maine and Lexington, Kentucky. (Id. at 291.) Plaintiff made the approach into Lexington, but "bounced" the airplane once on landing. (Id. at 294.). By plaintiff's description, "[i]t was an easy bounce, but it came back up, I felt, rather high." (Id. at 294-95.) After the bounce, plaintiff felt that insufficient runway remained, so he elected to execute a "go-around" or "touch-and-go"; that is, plaintiff piloted the plane back up into the air and executed another approach and landing. (Id. at 295-96.)

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Richard Eamer, apparently NME's chairman of the board and chief executive officer, was aboard the airplane and, after the plane bounced, called out "Will somebody please tell me what's going on." (Id. at 291-96.) Plaintiff then instructed flight mechanic Fenton Hutchinson to inform Eamer that "something blew across the runway." (Id.) Hutchinson complied with plaintiff's instructions. (Id.) Thereafter, plaintiff had a conversation with Walter Kraujalis, another NME pilot, wherein plaintiff stated that "I should not have lied to Mr. Eamer. And I'll take care of it [later]." (Id. at 298.) Later, Metz apparently told plaintiff not to worry about explaining this lie to Eamer. (Id. at 301.) When plaintiff subsequently learned that Eamer was upset about the falsehood, plaintiff offered his apology. (Id. at 303.) The events described in this paragraph are referred to by the parties as the "Lexington incident."

In September 1991, plaintiff was to meet Eamer at 8:30 a.m. for a 10:00 a.m. flight to Flint, Michigan. (Id. at 304-05.) Plaintiff arrived at the airport sometime after 8:45 a.m. (Id. at 304-07.) Eamer, who is partially deaf, may have misheard plaintiff's explanation of his tardiness and thus assumed that plaintiff was lying again. (Id. at 307-09; Metz Decl. ¶ 33.) Plaintiff may have subsequently told Metz that Eamer was annoyed by plaintiff's tardiness. (Bleasdell Dep. at 308.) The events described in this paragraph are referred to by the parties as the "San Diego incident."

In late 1991, Kraujalis was promoted to manager of the Aviation Department and Metz was accordingly demoted. (Kraujalis Decl. ¶ 7.) Eamer expressed to Kraujalis his

displeasure at Metz for failing to report both the Lexington incident, (Kraujalis Supp. Decl. ¶ 3), and plaintiff's role in the Gainsville incident, (Kraujalis Decl. ¶ 7). After his promotion, Kraujalis evaluated the Aviation Department personnel and concluded that plaintiff and three other employees were not performing at a level consistent with department standards. (Id. ¶ 11.) Thereafter, plaintiff, Alex Valero (maintenance assistant), Andrew Higgins (co-pilot), and Cynthia Thompson (flight attendant) were terminated. (Id. ¶¶ 11-12.) Plaintiff received notice of his termination on January 17, 1992. (Bleasdell Dep. at 115.) Kraujalis has stated that "Plaintiff's poor landing and dishonesty to Mr. Eamer during the Lexington incident coupled with his failure to act during the Gainsville incident caused me to lose confidence in Plaintiff's ability to perform his duties at the high level required of a corporate pilot." (Kraujalis Decl. ¶ 10.)

III. PROCEDURAL HISTORY

Plaintiff's first amended complaint, filed in state court on March 11, 1994, was removed to the district court on the basis of the federal question posed by plaintiff's claim under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621 et seq. Plaintiff names NME as the sole defendant and alleges causes of action for (1) wrongful termination in violation of public policy; (2) violation of the ADEA; (3) breach of contract; and (4) breach of the covenant of good faith and fair dealing.

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Following the filing of defendant's present motion for summary judgment, the Court allowed plaintiff significant additional time for discovery, pursuant to Federal Rule of Civil Procedure 56(f). The Court also allowed plaintiff to submit further briefs and evidence at, and following, oral argument on defendant's motion. As plaintiff has thus been afforded a full opportunity to discover, to present evidence, and to brief the matters at issue, defendant's motion is ripe for consideration.

IV. ANALYSIS

A. STANDARD FOR SUMMARY JUDGMENT

Summary judgment must be entered against a party who, after adequate time for discovery and upon motion, fails to make a showing sufficient to establish an element essential to that party's case, and on which that party would bear the burden of proof at trial. Fed. R. Civ. P. 56 (c); Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). A party moving for summary judgment may carry its initial burden by pointing out to the district court that there is an absence of a genuine issue of material fact. Id. at 323.

To avoid summary judgment, the non-movant must set forth specific facts showing that there remains a genuine issue of material fact for trial. Id. at 324. A factual dispute is genuine if a reasonable jury could return a verdict for the non-moving party. Anderson v. Liberty Lobby. Inc., 477 U.S. 242, 248 (1986). The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn

in the non-movant's favor. Id. at 255. If the non-moving party's evidence is merely colorable or is not significantly probative, then summary judgment may be granted. Id. at 249-50.

B. DISCUSSION

Defendant moves for summary judgment on each claim stated in plaintiff's amended complaint.

1. BREACH OF CONTRACT CLAIMS

In his contract-based claims (breach of contract and breach of the implied covenant of good faith and fair dealing), which are discussed collectively below, plaintiff claims that NME breached plaintiff's employment contract by terminating him without cause.

The California Labor Code provides that "employment, having no specified term, may be terminated at the will of either party on notice to the other." Cal. Lab. Code § 2922 (West 1989). This presumption of at-will employment may, however, "be superseded by a contract, express or implied, limiting the employer's right to discharge the employee." Foley v. Interactive Data Corp., 47 Cal. 3d 654, 665 (1988). For example, a claimant may attempt to show, through the employee's long service and exemplary performance, that the employer, by giving oral assurances of job security, impliedly agreed not to terminate the employee except for good cause. See id. at 675-82 (discussing, inter alia, Pugh v. See's Candies, Inc., 116 Cal. App. 3d 311 (1981)).

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The presumption of at-will employment may not, however, be rebutted by evidence of an implied-in-fact contract that is contrary to a preexisting valid and express agreement. Rochlis v. Walt Disney Co., 19 Cal. App. 4th 201, 211-12 (1993). Thus, in Rochlis, the plaintiff was prevented from introducing evidence of an implied contract that he would not be terminated except for good cause when his employment agreement expressly stated that the employer reserved the right of-termination "at any time for any reason whatever." Id. (citing Shapiro v. Wells Fargo Realty Advisors, 152 Cal. App. 3d 467 (1984)).

Defendant moves for summary judgment on plaintiff's breach of contract claim, arguing that the presumption of at-will employment is conclusive here. If that were so, NME could, of course, terminate plaintiff's employment at will without breaching any contract. Defendant points to the uncontroverted facts that plaintiff was hired for an unspecified term, (Bleasdell Dep. at 56-57, 77, 87-90), and to the three at-will agreements signed by plaintiff, see supra. Defendant then contends that any implied contract to terminate plaintiff for good cause would be contrary to the express employment agreements and thus run afoul of the rule of Rochlis.

In opposition, plaintiff argues that the employment agreements quoted above were not integrated contracts and thus did not set forth all of the terms of plaintiff's employment. In support of this theory, plaintiff looks to language in the employee handbook that states "I understand that this handbook and its contents are not intended to

create a contract of employment" and that the handbook may be modified or amended. (Bleasdell Decl., Exs. G-J.) Plaintiff thus contends that he should be allowed to introduce evidence of the existence of an implied-in-fact agreement. Defendant rejoins that plaintiff has failed to realize that the Rochlis rule applies to the employment-status provision since that provision, even if not the entire employment agreement, is fully integrated.

In order to conclude that a document is integrated, the Court must "'determine whether the writing is intended by the parties as a final expression of their agreement with respect to such terms as are included therein.'"[1] Slivinsky v. Watkins-Johnson Co., 221 Cal. App. 3d 799, 805 (1990) (quoting Cal. Civ. Proc. Code § 1856(d)). Significantly, an agreement may be integrated with respect to one or more, but less than all, of its provisions. Comeaux v. Brown & Williamson Tobacco Co., 915 F.2d 1264, 1271 n.7 (9th Cir. 1990) (applying California law). Thus, "[w]hen only one part of the agreement is integrated, the [parol evidence] rule applies to that part." Slivinsky, 221 Cal. App. 3d at 805 (internal quotation marks omitted) (alteration in original).

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[1] Under the parol evidence rule, extrinsic evidence of the subject matter expressed in an integrated writing is admissible only "to prove a meaning to which the language of the instrument is reasonably susceptible." Slivinsky, 221 Cal. App. 3d at 805 (internal quotation marks omitted).

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In examining the agreements to which plaintiff is signatory, quoted in full above, it certainly appears that they were intended to be a final expression of the parties agreement on the term of employment status. To wit, the 1983 agreement states that "[u]nless otherwise specified in a written contract . . ., all employment has no specified term and is governed by section 2922 of the Labor Code." (Bleasdell Dep., Ex. 6.) The other agreements contain substantially similar, if not identical, language. (See id., Exs. 7-8.) This conclusion is bolstered by the express merger clause contained in the 1990 Acknowledgement. (See id., Ex. 8.)

As the employment agreements in issue were completely integrated[2] with respect to plaintiff's employment status, plaintiff must not be allowed to introduce extrinsic evidence of an alleged implied-in-fact contract to terminate only for

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[2] Even if the provision in issue was not completely integrated, "there can be no implied contractual term completely at variance with an express term of the contract." Wagner v. Glendale Adventist Medical Ctr., 216 Cal. App. 3d 1379, 1383 (1989). The Wagner plaintiff was thus prevented from introducing evidence of an implied contract that contradicted the termination provision in the employee handbook which provided that termination was "at will." Id. at 1385-94.

A similar result would obtain here: Even if the employment-status provision was not fully integrated, plaintiff would be barred from introducing evidence of an implied contract since such evidence would be completely at variance with the contractual term stating that employment was at will.

good cause. Since defendant, in the absence of such a provision, would be free to terminate plaintiff at will, plaintiff's claim for breach of contract appears to fail as a matter of law.

In an attempt to avert this unfavorable result, plaintiff offers two additional arguments, each of which is easily disposed of. He first contends that the language of the agreements does not expressly "require" at-will employment. This contention is not supported by the express language of the agreements nor the express language of California Labor Code section 2922. Further, plaintiff's contention appears to be subsumed by the discussion immediately above (that is, proof of anything other than an at-will agreement would require introduction of contradictory evidence).

Second, although not entirely clear from his brief, it appears that plaintiff by his declaration suggests that he was coerced into signing the employment agreements quoted above.[3] (See Bleasdell Decl. ¶¶ 16-18.) Plaintiff has, however, previously testified in deposition that he did not recall either signing the documents or being pressured to sign the documents. (Bleasdell Dep. at 221-22.) He further testified that if "major" pressure were applied, he would have remembered. (Id.) As plaintiff's subsequent declaration, to the extent it is an attempt to argue that the

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[3] The Court has given plaintiff's declaration a liberal reading; that is, plaintiff states only that he "had to" and "was required to" sign the employment agreements.

employment agreement is invalid based on coercion, contradicts his previous sworn deposition testimony, the declaration must be rejected as a sham and found not to create a triable issue of fact. Kennedy v. Allied Mut. Ins. Co., 952 F.2d 262, 266-67 (9th Cir. 1991) (holding that sham affidavit subsequent to deposition testimony may not be used to create triable issue of fact); Radobenko v. Automated Equip. Corp., 520 F.2d 540, 544 (9th Cir. 1975) (holding that subsequent affidavit contradicting prior sworn testimony does not create genuine issue of fact); McCray v. Casual Corner, Inc., 812 F. Supp. 1046, 1048 (C.D. Cal. 1992) (same).

Based on the foregoing, plaintiff's claim for breach of an implied-in-fact contract fails as a matter of law and defendant's motion for summary judgment thereon must be GRANTED.

Lastly, assuming arguendo that plaintiff could prove that defendant was bound to discharge plaintiff only for good cause, it appears that good cause existed as a matter of law. That is, under California law an employer is permitted to subjectively evaluate the performance of employees who hold sensitive managerial or confidential positions. Pugh, 116 Cal. App. 3d at 330; see also Crosier v. United Parcel Serv., Inc., 150 Cal. App. 3d 1132, 1140 (1983). Here, it is uncontested that plaintiff held a confidential and sensitive position. (Bleasdell Dep. at 161-62.) Further, although the import of the Gainsville, Lexington, and San Diego incidents is in dispute, it is uncontroverted that those events did in fact occur. Thus, under the subjective standard

applicable here, defendant would have good cause to terminate plaintiff since CEO Eamer, correctly or incorrectly, was concerned with plaintiff's flying abilities and trustworthiness.

Based on the foregoing, and assuming that defendant was bound to terminate plaintiff only for good cause, defendant's motion for summary judgment on plaintiff's claim for breach of contract must be GRANTED on this alternative ground.

As plaintiff's claim for breach of the covenant of good faith and fair dealing is also contractual in nature, see Foley, 47 Cal. 3d at 693 (holding that absent special relationship, which is not present in employer-employee context, claim for breach of covenant of good faith is merely contractual), it too must fail for the reasons set forth above. Thus, defendant's motion for summary judgment on this claim is also hereby GRANTED.

2. VIOLATION OF PUBLIC POLICY CLAIM

In this claim, plaintiff contends that his termination based on age constitutes a tortious violation of the public policy concerns embodied in the ADEA, in the California Constitution, and in California's Fair Employment and Housing Act (FEHA), Cal. Gov't Code § 12920 et seq. Defendant moves for summary judgment on this claim on the basis of the statute of limitations.

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"The applicable statute of limitations for [a claim for discharge in violation of public policy] is one year." Funk v. Sperry Corp., 842 F.2d 1129, 1133 (9th Cir. 1988) (citing Cal. Civ. Proc. Code § 340; Miller v. Indasco, 186 Cal. App. 3d 1336, 1339 (1986)). The statute of limitations begins to run on this tort claim at termination. See id.

As plaintiff's complaint, which was filed on January 14, 1994, tolled the statute almost two years after his termination date of January 17, 1992, this claim appears time barred.

In opposition, plaintiff contends that Funk was wrongly decided based on the Ninth Circuit's reliance upon the Miller case, which was subsequently vacated by the California Supreme Court. Plaintiff further contends that his protected interest here is a property, as opposed to a personal, right and that California's two-year statute of limitations should therefore apply.

Plaintiff's contentions are without merit. First, rightly or wrongly decided, Funk remains binding precedent in this circuit. Second, Funk does not appear to be wrongly decided since it appears that the interest at stake in a discrimination case is personal in nature.

Based on the foregoing, defendant's motion for summary judgment on this claim is hereby GRANTED.

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3. AGE DISCRIMINATION CLAIM

Lastly, plaintiff contends that the termination decision was improperly based on consideration of his age and was thus in violation of the ADEA.

a. PRIMA FACIE CASE

Absent direct evidence, plaintiff may establish a prima facie case for age discrimination by proving: (1) that he was between the ages of 40 and 70; (2) that he was performing his job in a satisfactory manner; (3) that he was discharged; and (4) that he was replaced by a "substantially younger employee with equal or inferior qualifications." Rose v. Wells Fargo & Co., 902 F.2d 1417, 1421 (9th Cir. 1990). Summary judgment is appropriate when plaintiff fails to produce sufficient facts in support of his prima facie claim. Stallcop v. Kaiser Found. Hosps., 820 F. 2d 1044, 1050 (9th Cir.), cert. denied, 484 U.S. 986 (1987). Defendant contends that plaintiff lacks evidence to support the second and fourth elements of his prima facie case.

(i) SATISFACTORY PERFORMANCE

Defendant contends that, in light of the Gainsville, Lexington, and San Diego incidents described above, plaintiff cannot establish that he was performing his job in a satisfactory manner.

In opposition, plaintiff contends that the following facts, which are discussed below, demonstrate triable issues on

whether his performance was satisfactory: the declaration of Robert Metz, plaintiff's two most recent performance evaluations, a general lack of criticism of plaintiff's performance, and NME's different treatment of younger pilots.

In sum, Metz, who has thirty years of experience as a pilot, contends that the incidents cited by NME do not constitute "firing offenses."[4] Plaintiff then relies on Dey v. Colt Construction & Development Co., 28 F.3d 1446, 1460 (7th Cir. 1994), to support his proposition that, by refuting defendant's proffered firing offenses, plaintiff has demonstrated a genuine issue of fact.

Defendant offers a closer, and ultimately more persuasive, reading and analysis of Dey.[5] In Dey the Seventh Circuit noted that "general averments of adequate

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[4] Metz, for example, states: that the two suspect landings do not demonstrate that plaintiff was not performing satisfactorily, (Metz Decl. ¶¶ 20, 24); that it was unreasonable for Kraujalis to criticize plaintiff for the Lexington incident since Kraujalis was a training instructor on that flight; (id. ¶¶ 17, 19); that Kraujalis had a duty to report any piloting problems with plaintiff and provide correctional instruction; (id. ¶¶ 18-19, 21); and that Metz found plaintiff to have acted correctly in the Gainsville incident, (id. ¶¶ 23-29).

[5] Although the Dey court was specifically discussing the effect of a co-worker's statements in the pretext, as opposed to prima facie, phase of discrimination analysis, the parties apparently agree that it is equally applicable in the present discussion of plaintiff's prima facie case.

performance are insufficient to create a factual issue on summary judgment even when corroborated by statements of supervisors or co-workers." Id. The court continued, however, by stating that "a plaintiff may create an issue of fact by specifically refuting facts that allegedly support the employer's claim for performance deficiencies." Id. (emphasis added). Here, as defendant correctly notes, the evidence proffered by plaintiff supports, not refutes, the facts relied on by defendant in support of its claim of inadequate performance. That is, the Metz declaration confirms that the suspect landings did in fact occur, (e.g., Metz Decl. ¶¶ 14-15, 23), that plaintiff lied to Eamer about the Lexington landing, (id. ¶ 14), and that Eamer believed that plaintiff lied again at the San Diego airport, (id. ¶ 33).

That Metz offers a different opinion on the meaning of these uncontroverted facts is insufficient to demonstrate the existence of triable factual issues. Similarly, in Anderson v. Baxter Health Care Corp., 13 F.3d 1120, 1125 (7th Cir. 1994), the court wrote that "the mere submission of materials from a co-worker or a supervisor indicating that an employee's performance is satisfactory, or more specifically that an employee's performance is satisfactory because he was not entirely responsible for several admitted mishaps, does not create a material issue of fact." See also Williams v. Williams Elecs., Inc., 856 F.2d 920, 924 (7th Cir. 1988) (former supervisor's affidavit stating that plaintiff performed satisfactorily did not create genuine issue of fact).

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Plaintiff also contends that prior lack of criticism and good performance reviews evince his satisfactory performance. Again, assuming the truth of plaintiff's assertions, they still do not refute the occurrence of the incidents that allegedly troubled Eamer. Additionally, it is noteworthy that Metz, who was plaintiff's supervisor at the time of the incidents, was demoted in part for his failure to report plaintiff's falsehood regarding the Lexington incident. (Kraujalis Decl. ¶ 7.) It would thus appear that a lack of criticism of plaintiff was not due to his good performance but rather to Metz's failure to perform his duties. Metz's opinion and lack of criticism of plaintiff's performance is then at odds with the facts and, in any event, insufficient to avert summary judgment.

In his last argument of any significance, plaintiff suggests that younger pilots were treated differently for their "performance problems." Assuming that the disciplinary memoranda offered by plaintiff, (Darrow Decl., Ex. B), were directed to younger pilots, they fall far short of establishing any "differential treatment." It is, for example, unclear whether the incidents described in these memoranda were more or less serious than those involving plaintiff and whether any of those incidents involved attendant falsehoods. In any event, this evidence does not controvert defendant's evidence regarding the imperfect landings and falsehoods.

In his supplemental papers, plaintiff presents evidence of alleged infractions by Kraujalis that, according to plaintiff, were more serious than the incidents complained

of by Eamer. Plaintiff asserts that Kraujalis's use of the company aircraft to fly Eamer home from vacation was in violation of company policy, which proscribed the use of the aircraft for personal trips. Plaintiff further asserts that Kraujalis later used a company jet to fly Eamer to San Diego for medical treatment shortly after Eamer experienced a heart attack. Plaintiff asserts that Kraujalis made this flight after consuming a glass of wine and notwithstanding that he was not "current" (i.e., had not accumulated sufficient recent flight hours to qualify as pilot) in the aircraft. Plaintiff asserts that, as the younger Kraujalis was not disciplined for these infractions, NME afforded differential treatment to its pilots on the basis of age.

Again, this evidence does not raise an inference that plaintiff was performing his job satisfactorily, especially in the eyes of CEO Eamer. That is, this evidence does not show that Eamer was in fact comfortable flying with plaintiff as pilot-in-command or was not in fact uncomfortable with plaintiff's perceived pattern of uttering falsehoods. Although this evidence certainly suggests that Eamer had tremendous confidence in Kraujalis's abilities as pilot, it does not suggest that he was like-minded about plaintiff's skills, but nonetheless fired plaintiff because he was too old. It is undisputed that plaintiff was responsible for two flight-related incidents that troubled Eamer, that plaintiff lied to Eamer, and that Eamer thought that plaintiff lied to him on another occasion. Based on these facts, plaintiff simply cannot show that he was performing his work satisfactorily.

Further, the cases relied on by plaintiff's counsel on this point do not countenance a different result.[6] In Shager v. UpJohn Co., 913 F.2d 398 (7th Cir. 1990), the plaintiff introduced direct evidence that he was performing satisfactorily and that defendant's assertions to the contrary were greatly exaggerated. For example, the plaintiff there, a sales representative, generated excellent sales in spite of the fact that defendant divided plaintiff's sales territory into two portions and gave the more promising portion to a younger employee. Id. at 399-401. Although plaintiff continued to "best" the younger sales representative, the younger employee was praised while plaintiff was disciplined for an alleged failure to perform "ministerial aspects of his job"-- collecting accounts receivable and managing other sales representatives. Id. Further, plaintiff demonstrated that defendant acted with age-based animus by making several disparaging remarks about the older employees. Id.

This case offers no solace to Bleasdell: Plaintiff certainly cannot characterize flying, or even speaking truthfully to the CEO of the company, as a ministerial aspect of his job. Further, plaintiff here has introduced no direct evidence of age-based animus, as was the case in Shager.

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[6] Although these cases deal with the pretext portion of the burden-shifting analysis, as opposed to the prima-facie-case component, they are discussed at this juncture since plaintiff attempts to use them to demonstrate that he was performing satisfactorily.

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In Rengers v. WCLR Radio Station, 825 F.2d 160, 161 (7th Cir. 1987), the plaintiff, a fifty-one year-old disc jockey, was terminated for his alleged tardiness and "'dead air,' that is periods when no sound was being transmitted over the air." On appeal following denial of defendant's jnov motion, the court found that plaintiff sufficiently demonstrated satisfactory performance since there had been no complaints of tardiness after a reprimand two years prior and since the dead air was the fault of defendant's chief engineer. Id. at 164. Thus, the jury's determination that defendant's proffered reasons were pretextual was sufficiently supported. Id.

Again, this case provides no comfort to plaintiff Bleasdell. He cannot, for example, claim that the Gainsville, Lexington, and San Diego incidents either did not happen or were so remote as to be pretext. Further, responsibility for his errors in the cockpit and for his falsehoods are his and his alone.

Finally, plaintiff's counsel repeatedly invoked the proposition, set forth in Futrell v. J.I. Case, 38 F.3d 342, 349 (7th Cir. 1994), that "[a]n employer's proffered explanation for a discharge does not prevail simply because it contains a true factual predicate." Thus, continues plaintiff, that the three complained of incidents did in fact occur is not sufficient to show that plaintiff was not performing satisfactorily. Although plaintiff is correct on this non-controversial point, plaintiff's ultimate position is not improved since he fails to give Futrell an accurate reading. That is, the point made by the Futrell court is that

"there must be a causal link between the explanation [i.e., the factual predicate] and the discharge." Id. at 349. Thus, the Futrell plaintiff withstood a jnov motion since defendant's proffered reasons, even though factually true, appeared to be catalogued post-termination in "an attempt to justify termination after the fact." Id.

The same cannot be said here: The true factual predicate for Bleasdell's termination is directly and closely linked to his discharge. It is uncontested that Eamer was troubled by plaintiff's performance and by plaintiff's apparent propensity to lie (the factual predicate), that Eamer made his concerns known before plaintiff's termination, and that these concerns were offered as a non-discriminatory explanation for termination. The factual predicate here was not, for example, recalled from some distant memory and dusted off simply for purposes of litigation.

As plaintiff will be unable to meet his burden of showing that he was performing his job satisfactorily, his claim for age discrimination is destined to fail as a matter of law. Therefore, summary judgment must be GRANTED for defendant on this ground.

(ii) SUBSTANTIALLY YOUNGER REPLACEMENT

To meet the fourth element of his prima facie case, plaintiff must show that he was replaced by "another person of similar qualifications generally outside the protected age group." Levy v. Regents of Univ. of Cal., 199 Cal. App. 3d 1334, 1344, cert. denied, 488 U.S. 893 (1988) ; see also

Phipps v. Gary Drilling Co., Inc., 722 F. Supp. 615, 622 (E.D. Cal. 1989) (stating that replacement by employee in protected age group "constitutes probative evidence dispelling age discrimination motive"); Douglas v. Anderson, 656 F. 2d 528, 533-34 (9th Cir. 1981) (granting, directed verdict for employer when replacement merely five years younger).

Here, it appears uncontroverted that plaintiff's replacement, although within the protected age group, was six years younger than plaintiff at the time of his termination. Plaintiff has introduced evidence, again by the declaration of Metz, that, as far as corporate pilots go, a 46 year old pilot is substantially younger than a 52 year old pilot. It thus appears that a triable issue exists with respect to this element and that summary judgment on this alternative ground would be inappropriate.

b. PRETEXT

Assuming arguendo that plaintiff could meet his initial burden of supporting a prima facie case, he would still have to demonstrate that NME's purported nondiscriminatory reason for termination (the three incidents) was pretextual. See Rose, 902 F.2d at 1420. Specifically, plaintiff must show both that defendants' articulated reason was false and that the real reason for termination was discrimination. St. Mary's Honor Ctr. v. Hicks, 113 S. Ct. 2742, 2752 (1993). In determining whether a triable issue of fact is present at this stage, the Court "must consider all the evidence, including that offered to establish the prima facie case[]."

Wallis v. J.R. Simplot, 26 F.3d 885, 892 (9th Cir. 1994). "If a rational trier of fact could, on all the evidence, find that the employer's action was taken for impermissibly discriminatory reasons, summary judgment for the defense is inappropriate." Id. at 889. However, "when evidence to refute the defendant's legitimate explanation is totally lacking, summary judgment is appropriate even though plaintiff may have established a minimal prima facie case." Id. at 890-91.

As discussed above, plaintiff is unable to meet the first prong of the pretext test (falsity) since it is undisputed that the three incidents did in fact occur.

Further, plaintiff's various attempts to satisfy the second prong of the pretext test (that the real reason was discrimination) also fail.

Plaintiff first states that his past good performance and evaluations raise a triable issue on whether NME's reasons were pretextual. As discussed above, the lack of criticism of plaintiff appears to be due, in part, to Metz's failure to perform his job. Similarly, plaintiff also suggests that the delay between the cited incidents and plaintiff's termination indicates pretext. This again would not appear to raise a genuine issue since the delay appears to have been caused by Metz's failure to report the incidents. That is, plaintiff has not controverted defendant's evidence that the termination took place shortly after Eamer finally learned of the Gainsville incident. (Kraujalis Supp. Decl. ¶ 3.)

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Second, plaintiff suggests that NME's "exaggeration" of the significance of the various incidents indicates pretext. As evidence of exaggeration, plaintiff again relies on the declaration of Metz. As Metz was terminated in part for his failure to discipline pilots, it would not appear that his opinion on the significance of plaintiff's mishaps is particularly helpful to plaintiff's case. Moreover, as discussed above, a mere difference in opinion of a co-worker or supervisor, which is based on undisputed facts, does not suggest that triable issues exist. See Dey, 28 F.3d at 1460; Anderson, 13 F.3d at 1125; Williams, 856 F.2d at 924.

Plaintiff next contends that Kraujalis had a duty to report any perceived inadequacies in plaintiff's abilities to Metz, and that plaintiff's termination based on unreported incidents is evidence of pretext. Plaintiff neglects, however, to offer any evidence of such a duty on Kraujalis's part. Additionally, plaintiff suggests that Eamer never advised Metz to terminate plaintiff for dishonesty, and that this again is evidence of pretext. It is, however, undisputed that Eamer had Metz himself demoted shortly after learning of the dishonesty, in part for Metz's failure to report the incidents.

Plaintiff's fourth point in support of his pretext theory (that the incidents were not serious enough to warrant termination) is again a mere difference of opinion and is dealt with, in various places, above.

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Plaintiff next contends that NME's failure to follow its own termination procedures is evidence of pretext. Plaintiff cites NME's policy of "progressive discipline" and then suggests that less drastic measures should have been taken before termination. By selectively quoting from NME's employment policy, plaintiff fails to recognize that the progressive discipline policy is "discretionary[,] as there may be situations where . . . immediate termination is necessary." (Metz Decl., Ex. E.) Thus, NME did not fail to follow its own procedures.

Plaintiff next suggests that NME's conflicting reasons for discharging plaintiff (management reorganization, resignation, and dishonesty) show pretext. These reasons are not "conflicting," as each is in fact accurate. It is uncontested that the management of the aviation department was reorganized, that plaintiff did agree to "resign" in exchange for a severance package, and that Eamer did want plaintiff ousted in part for dishonesty.

Plaintiff's seventh point (delay in asserting poor performance) is also discussed elsewhere in this memorandum and order. Plaintiff's eighth and ninth points (inconsistencies in defendant's evidence and the alleged failures to recall specific facts) largely amount to differing opinion over the import of uncontested facts or to mischaracterization of the evidence itself. Plaintiff's similar argument, that Kraujalis's use of "rigid" and "autocratic" to describe plaintiff amounts to using "code words" for aged-based animus, fails for the same reason. See also Rose, 902 P.2d at 1423 (stating that triable issue not raised by

proof of defendant's use of colloquial expressions unrelated to protected characteristic); Merrick v. Farmers Ins. Group, 892 F.2d 1434, 1438-39 (9th Cir. 1990) (stating that such "stray remarks" do not raise triable issue as to pretext). Plaintiff's tenth and final point (that younger pilots, particularly Kraujalis, were treated differently) is also treated elsewhere.

Assuming arguendo that he could make a prima facie showing, plaintiff has failed to introduce sufficient evidence to show that defendant's nondiscriminatory reason for terminating plaintiff's employment is pretextual. Plaintiff has not demonstrated a triable issue as to the falsity of defendant's proffered non-discriminatory reasons. Further, although plaintiff has pointed to many facts and has offered up many theories, nothing introduced appears to indicate, directly or by reasonable inference, that plaintiff was terminated because of his age. Thus, on this alternative ground, summary judgment is also hereby GRANTED in favor of defendant on plaintiff's ADEA claim.

Lastly, to the extent that plaintiff alleges age discrimination under the FEHA, this claim fails for reasons set forth above. See Mixon v. Fair Employment & Housing Comm'n, 192 Cal. App. 3d 1306, 1316 (1987); County of Alameda v. Fair Employment & Housing Comm'n, 153 Cal. App. 3d 499, 504 (1984).

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V. CONCLUSION

Perhaps defendant did overreact in firing plaintiff over the three incidents identified above. It is also possible that plaintiff's trustworthiness should not have been called into question based on his behavior as described herein.

Nevertheless, it is uncontroverted that the underlying events occurred and that they troubled the defendant employer. Absent any proof, direct or circumstantial, that plaintiff was fired because of his protected characteristic, this Court must allow defendant to exercise its discretion in making employment decisions and must not "sit as a super-personnel department [and] reexamine[] [defendant's] business decisions." Dale v. Chicago Tribune Co., 797 F.2d 458, 464 (7th Cir. 1986), cert. denied, 479 U.S. 1066 (1987).

SO ORDERED.

Dated: August 28, 1995

/s/
LOURDES G. BAIRD
United States District Judge

Appendix C

APPENDIX C - ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DENYING REHEARING FILED NOVEMBER 7, 1997

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED
NOV 7 1997
Cathy A. Catterson, Clerk
U.S. Court of Appeals

DAVID K. BLEASDELL,
Plaintiff-Appellant,
v.
NATIONAL MEDICAL ENTERPRISES, INC.,
Defendant-Appellee.

No. 95-56470
D.C. No. CV 94-01989-LGB

ORDER

Appendix C

Before: SCHROEDER, FERGUSON, and LEAVY, Circuit Judges

Judge Schroeder and Judge Ferguson have voted to deny the petition for rehearing. Judge Leavy has voted to grant the petition.

Judge Schroeder has voted to reject the suggestion for rehearing en banc. Judge Ferguson has recommended rejection. Judge Leavy has recommended acceptance of the suggestion.

The full court has been advised of the suggestion for rehearing en banc and no judge of this court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.